Supreme Court, U. S.
FILED
JUL 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON; CHARLES HODDE; JACK G. NELSON; and ROBERT S. O'BRIEN,

Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

Appellees.

STATE OF WASHINGTON,

Appellant,

v.

UNITED STATES OF AMERICA AND CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF OF AMICI CURIAE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, MONTANA, SHOSHONE TRIBE OF THE WIND RIVER INDIAN RESERVATION, WYOMING, AND STANDING ROCK SIOUX TRIBE OF NORTH AND SOUTH DAKOTA IN SUPPORT OF APPELLEES

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INTEREST OF AMICI

This brief is submitted with the written consent of all parties to the case, lodged with the Clerk. See Rule 42(2) of the Rules of this Court. *Amici*, three major Indian

tribes, are interested in this case to protect their governmental authority to tax transactions involving Indian commerce on their reservations and to protect tribal enterprises from injury and destruction by state taxation.

QUESTION PRESENTED

Whether a state may validly tax sales by Indian retailers to non-Indian purchasers where the sales are made on trust land within an Indian Reservation, the Tribe has also taxed and regulated the transaction, and the United States has licensed the seller?

STATEMENT

I. Introduction

These consolidated cases were brought by the United States and four Indian tribes against the State of Washington to enjoin imposition of various state taxes upon Indians and non-Indians on Indian reservations. The three-judge district court generally granted the relief sought.

Amici will address only one issue on appeal – whether a state may validly tax sales by Indian retailers, licensed by both the United States and the tribe, to non-Indian purchasers where the tribe has also taxed and regulated the transaction.[1] *Amici* submit that the state sales and excise taxes upon this type of transaction are invalid

[1]The state agrees that this "is the most crucial issue in this case" (St. Br. p. 54). *Amici* submit that the present case differs from *Confederated Salish & Kootenai Tribes v. Moe*, 425 U.S. 463 (1976) because the tribes tax and regulate these transactions. See particularly Part IIB, *infra*.

Amici will not consider the validity of state excise taxes on motor vehicles, motor homes, campers or trailers or the validity of the State's general retail sales tax where no tribal tax is imposed (at issue in the Yakima case). *Amici* also assume that the appeals are within the jurisdiction of this Court.

under Article I, §8, cl. 3 of the United States Constitution because they interfere with commerce with the Indian tribes.

II. Statement of Facts

Three of the four Indian tribes in this case – the Colville, Lummi and Makah – operate tribally owned businesses selling cigarettes and tobacco products on their reservations. These businesses commonly sell other goods as well – such as handicrafts, groceries and sundries – but this appeal concerns only state taxation of sales of tobacco products. The tribes purchase the tobacco products wholesale with tribal funds held in trust for them by the United States. All the tribal outlets operate on trust land within the reservations.

Each tribe imposes a uniform tax on all sales of cigarettes and tobacco products, whether to Indians or non-Indians. The tribes also regulate the manner in which cigarettes are sold on the reservation. For example, sellers must carry liability insurance,[2] may sell only a limited amount of tobacco products to non-Indians,[3] and must refrain from selling to minors.[4]

Each tribal tax supplies substantial tribal revenues – found by the district court to be $265,760 to the Colville Tribe, $54,440 to the Lummi Tribe, and $13,490 to the Makah Tribe annually (446 F. Supp. at 1347). Each reservation was found by the district court to be "isolated and underdeveloped," with high unemployment and with most goods and services located off the reservation. The district court also found that tribal tax revenues are

[2]E.g., Colville Ordinance, Appendix, pp. 104-110, §19.

[3]*Id.*, §13.

[4]*Id.*, §14.

used to fund tribal programs to stimulate economic development, and provide for reservation health needs, education and social welfare. (*Id.* at 1346.)

In a different fashion, the Yakima Tribe also taxes cigarettes and tobacco products sold on its reservation. The Tribe purchases cigarettes wholesale and resells them to dealers licensed by it at a one-cent per carton mark-up. At the time of resale, the Tribe also imposes a permit fee on the dealer of 22.5 cents per carton. The district court found that the Yakima Tribe derives approximately $278,000 annually from this fee. (446 F. Supp. 1368-1369.)

For the Colville, Lummi and Makah Tribes, the district court found that "nearly ninety percent of the Tribes' sales are made to non-Indians" and that if the state tax were imposed "the cigarette sales commerce between the Tribes and non-Indians would be destroyed" (*id* at 1347). The court below also found that a majority of the sales by the Yakima Tribe are to non-Indians and that this Tribe's "tribal cigarette enterprises would be destroyed" if the state sales tax were allowed (*id* at 1369). This is because demand for cigarettes is price-elastic, and the price of cigarettes to non-Indians (if they are required to pay both state and tribal taxes on purchases from the tribes) would substantially exceed the price paid by non-Indian purchasers to non-Indian retailers off the reservation where there is no liability for the tribal tax.[5] The state itself acknowledges that, in order to continue operation, these tribal tobacco outlets all require immunity from state taxes on their sales to non-Indian customers. This is necessary to compensate for their "locational disadvantages" of "being remote from markets." (St. Br., pp. 20-21, testimony of expert economist).

[5]The state concedes that its tax would have this effect. St. Br., p. 69.

SUMMARY OF ARGUMENT

Paramount federal law precludes state taxation which would destroy Indian commerce between Indian tribes and non-Indians. The effect of the state taxes challenged here is to destroy Indian commerce and provide a direct commercial advantage to non-reservation businesses. This is unlawful. *Boston Stock Exchange v. State Tax Comm.*, 429 U.S. 318 (1977); *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959).

This case is distinguishable from *Confederated Salish & Kootenai Tribes v. Moe,* 425 U.S. 463 (1976). In *Moe,* the tribe did not impose a tax on sales by Indian retailers; Indian and local commerce were thus treated equally by imposition of the state tax in that case. Also, the retailer had not secured a federal Indian trader's license, and the United States had not subjected his business to its comprehensive Indian trading regulations. Collision between federal regulation and state law – absent in *Moe* – is present here. *Warren Trading Post v. Arizona State Tax Comm.*, 380 U.S. 685 (1965).

Finally, Indian tribes have long been recognized as having power to tax non-Indians who enter the reservation to do business with Indians. E.g., *Morris v. Hitchcock,* 194 U.S. 384 (1904). A virtually unbroken line of cases, administrative decisions and the understanding of Congress when it enacted the Indian Reorganization Act, 25 U.S.C. 461, 476, confirm the existence of this power.

ARGUMENT

The present case deals specifically with tribal and state power to tax sales of tobacco by tribal enterprises to non-

Indians. Tobacco, of course, was the subject of the earliest commerce between Indians and non-Indians in America. Broad issues concerning Indian commerce with non-Indians and tribal economic betterment are at stake in this appeal. At stake is whether tribes will maintain their authority to control tribal enterprises and to guide and protect economic development on their reservations. In the modern society, development on Indian reservations must inevitably enlist significant non-Indian involvement – be it non-Indian talent and technicians, non-Indian capital investment or non-Indian customers. No Indian tribe is or can be entirely self-sufficient in its development efforts. This case involves a state action which – if allowed – would thwart a particular tribal economic development project.

Amici submit that paramount federal law precludes state taxation where the effect of that taxation is to destroy commerce between an Indian tribe and non-Indians on trust lands within an Indian reservation. At issue here is no artificial "tax haven"[6] nor any gimmick to "market" an Indian tax exemption to non-Indians.[7] Rather, this case concerns whether an important avenue of constitutionally-protected commerce between Indians and non-Indians – a source of greatly needed revenue, jobs and income for economically underdeveloped Indian tribes – can be shackled by state taxation.

"Commerce . . . with the Indian tribes" of course is subject to the plenary regulatory power of Congress under Art. I, §8, cl. 3, of the Constitution. Like interstate commerce and commerce with foreign nations, commerce with Indian tribes has always been the subject of

[6] St. Br., p. 68, 85, 88.

[7] St. Br., p. 58, 65-68, 72, 73, 83, 90, 91.

comprehensive and paramount federal authority. State taxation of Indian commerce has accordingly been strictly limited by numerous decisions of this Court.

In Part I of this Argument, we will analyze the Indian commerce involved as if it were only entitled to the same constitutional protection from state taxation as interstate commerce. In Part II, we answer the two principal arguments the State advances to support its scheme. Part III suggests that Indian commerce is in fact more comprehensively protected against state taxation than is interstate commerce. And in Part IV, we discuss tribal authority to tax non-Indians.

I.

THE STATE SALES AND EXCISE TAXES ARE UNCONSTITUTIONAL BECAUSE THEY WOULD INFRINGE UPON – INDEED, DESTROY – COMMERCE WITH INDIAN TRIBES

Our "starting point" is the well-established proposition that "the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman v. Hewit,* 329 U.S. 249, 252 (1946); *Boston Stock Exchange v. State Tax Comm.,* 429 U.S. 318, 328 (1977). For example, in *Boston Stock Exchange, supra,* this Court invalidated an amendment to New York's tax laws designed to protect the New York Stock Exchange from out-of-state competition. Prior to the amendment, New York had long taxed all transactions in securities where any one of several events – the sale, agreement to sell, or delivery or transfer of certificates – took place in the state. Other states where stock exchanges were located imposed no comparable transfer tax. To protect the New York Stock Exchange from out-of-state competition, the New York legislature amended

its law in two respects to reduce the tax where the sales of stock took place in New York.

Relying on language in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959), this Court held that "no State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business.' " 429 U.S. at 329. The Court considered the practical effect of the changed tax, observing that:

> "Prior to the 1968 amendment, the New York transfer tax was neutral as to in-state and out-of-state sales. An in-state transfer or delivery of securities triggered the tax and the burden fell equally on all transactions regardless of the situs of sale. Thus, the choice of an exchange for the sale of securities that would be transferred or delivered in New York was not influenced by the transfer tax; wherever the sale was made, tax liability would arise. The flow of interstate commerce in securities was channeled neither into nor out of New York by the state tax.
>
> * * *
>
> "The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges. Rather than "compensating" New York for a supposed competitive disadvantage resulting from §270, the amendment forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States."

(*Id* at 330-331)

In the present situation, as in *Boston Stock Exchange*, federally-protected commerce is discouraged vis-a-vis local

(i.e., commerce with dealers outside the reservation) commerce – even though here the tax is not discriminatory on its face. This is because purchasers of cigarettes from "local" (non-reservation) sellers pay only the state tax. Purchasers of cigarettes in Indian commerce pay both state and tribal taxes.[8] To paraphrase this Court's holding in *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 (1963), "the conclusion is inescapable: equal treatment for . . . taxpayers" purchasing from tribal sellers on the reservation and from non-Indian sellers outside the reservation and not subject to tribal taxation "is the condition precedent for a valid" state sales tax on purchasers of the Indian commerce.

The district court found and the state concedes that the practical effect of the state tax would be to destroy the Indian commerce. In the present case, discrimination is apparent, and in no way conjectural.

Moreover, in the present case and unlike cases like *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)[9] and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), the State has not even attempted fairly to apportion its tax, nor has it sought to impose a fairly apportioned compensatory use

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[8] The necessary premise of our argument is that Indian tribes have the authority to levy the taxes in question. This premise is discussed in Part IV *infra*.

[9] In *Complete Auto Transit*, the Court stated that a state tax on interstate commerce will be sustained:

> "* * * when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." (*id.* at 279)

tax on the use outside the reservations of articles purchased from the tribes. It has thus chosen the taxing alternative most destructive of tribal commerce and tribal government. *Amici* here take no position on whether a fairly apportioned tax would be lawful, since that issue is not presented by this record. Clearly, in the absence of apportionment, Indian commerce is discriminated against – indeed, destroyed, as the district court found – and local business is given a "direct commercial advantage."

II.
THE STATE'S ARGUMENTS ARE UNPERSUASIVE

A. Multiple burdens of state and tribal taxation are not permissible on Indian commerce.

The State seeks to avoid the above argument by contending that it *may* impose a double tax burden on interstate as well as Indian commerce. As an example, it asserts that it may lawfully "tax its citizens with respect to in-state use or consumption of cigarettes purchased" out-of-state, without giving a credit for the out-of-state sales tax. (St. Br., p. 62.)

That is not the law. In the case relied on by the State, *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), the Court repeatedly emphasized that interstate commerce could be subjected to a total tax burden *equal* to that imposed on local commerce. Speaking for the Court, Mr. Justice Cardozo emphasized:

> "Equality is the theme that runs through all the sections of the statute * * * * No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere." *Id* at 583-584.

The Court carefully emphasized in *Henneford* that a use tax must be non-discriminatory as applied to interstate commerce. Summarizing this and the later cases on the subject, Professor Laurence Tribe has written:

> *"[T]he Court has consistently struck down those state taxes which it concludes unjustifiably benefit local commerce at the expense of out-of-state commerce."* L. Tribe, American Constitutional Law, 354-355 (1978) (emphasis in original).

In *Bryan v. Itasca County*, 426 U.S. 373, 388, n.14 (1976), this Court spoke to the dangers of multiple layers of taxation in the Indian context:

> "Much has been written on the subject of a devastating impact on tribal governments that might result from an interpretation of §4 as conferring upon state and local governments general civil regulatory control over reservation Indians . . . (citations omitted). The suggestion is that since tribal governments are disabled under many state laws from incorporating as local units of government, . . . (citation omitted) general regulatory control might relegate tribal governments to a level below that of counties and municipalities, thus essentially destroying them, *particularly if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation.*" (emphasis supplied)

The Court in *Bryan* accordingly invalidated the regulations involved. The State offers no special justification for its multiple taxation here, and none appears on this record.

B. Confederated Salish & Kootenai Tribes v. Moe is distinguishable.

The State incorrectly urges that *Confederated Salish & Kootenai Tribes v. Moe*, 425 U.S. 463 (1976), would be "meaningless"[10] if *Amici's* position is adopted. The present case is distinguishable from *Moe* in two separate and important respects. First, the tribe in *Moe* had not adopted and the Secretary of the Interior had not approved a tribal tax on those transactions. The state tax in *Moe* did not therefore disfavor Indian commerce as against local commerce, or infringe upon a federally approved tribal taxing and regulatory program. Second, the individual Indian retailer in *Moe* had neither sought nor obtained a federal Indian traders license. Thus, direct collision between the state tax and the comprehensive federal regulatory scheme was absent in *Moe*.

Approval of tribal taxing ordinances and federal licensing and regulation of Indian traders are no "mere stroke[s] of a pen" concocted simply to circumvent *Moe*, as the State suggests.[11] The opposite is true.[12] Unlike *Moe*, there is here substantial positive federal legislative and executive implementation of the Indian Commerce Clause, asserting federal control over and support for important tribal economic development activities.

[10] St. Br., p. 54.

[11] St. Br., p. 74.

[12] Indian tribes well know that Interior Department approval of tribal ordinances is anything but an empty formality. Ordinances of *Amici* are often disapproved by the Department, or returned to the tribe with approval conditioned on specified modifications. Securing approval of tribal ordinances frequently requires prolonged negotiation with Interior officials over the content and language of an ordinance.

The state tax here would directly frustrate these federal actions by destroying the authorized tribal activities.

Amici submit that this case is directly analogous to *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965). In *Warren Trading Post*, the Court held the state preempted by comprehensive federal regulatory action from imposing its gross receipts tax on the retail business of a federally licensed *non-Indian* trader on the Navajo Reservation. The Court emphasized that

> "* * * from the very first days of our Government, the Federal Government has been permitting the Indians largely to govern themselves, free from state interference, and had exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes." 380 U.S. at 686-688 (footnotes omitted).

As the Court observed in *Warren*, continuously since the first Congress in 1790, federal statutes have controlled all aspects of Indian trading. In place of the federal silence and passivity in *Moe*,[13] there is specific federal preemption present here.

Amici are aware, of course, that this Court stated in *Moe*, 425 U.S. *supra* at 482, that *Warren* did not preclude state taxation of Indian cigarette sales to non-Indians. As applied to the facts of that case, that statement is of course true. The present case, however, is exactly the same as *Warren Trading Post*, except that the non-Indian is the buyer and a tribal enterprise is the seller. In each case, the legal incidence of the state tax falls on the non-Indian, and *Amici* submit that it should make no differ-

[13] By contrast, the United States did not appear in any capacity in *Moe*.

ence whether the non-Indian is seller or buyer.[14] The comprehensive Indian trading statutes have always controlled persons buying articles from Indians (such as furs in the early days) as well as persons selling to them.[15] Commerce means buying and selling. Selling free of state taxation is at least as important to Indians as buying free of state taxation. Absence of state taxation in buying saves a small amount for each Indian purchaser. Absence of state taxation is selling allows Indian commerce to function, creating jobs and income.[16]

Nor can it matter that *Warren Trading Post* involved a gross income tax rather than sales and excise taxes. The effect of the state taxes here would be even more disruptive of tribal trade than the tax in *Warren* because this taxation would effectively destroy an avenue of Indian commerce.

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[14] In *Moe*, this Court observed that "there was in Warren no claim that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians." Id. at 482. On the facts of *Warren*, which involved a non-Indian seller, there could of course be no objection to the state's taxing his sales to non-Indians, for no Indian commerce would be involved.

[15] For example, 25 U.S.C. 263 – derived from nineteenth century acts – authorizes prohibition of all trade, or trade in certain commodities, in Indian country. Indian trading is also the subject of extensive Interior Department regulations, 25 CFR Parts 251 and 252.

This means that the federal executive (not the states) can prohibit or condition certain kinds of commerce between Indians and non-Indians seen as injurious to federal Indian relations or policy, or to the relationship between Indians and non-Indians.

[16] For example, if states can tax non-Indians doing business with Indians on reservations, Indian tribes cannot offer non-Indians business tax incentives to locate there or to joint venture development projects on reservations. The offering of such favorable tax incentives is a major device open to state, county and local governments. The State's position would deny this option to Indian tribes, the poorest of American governments.

III.

INDIAN COMMERCE IS ENTITLED TO MORE COMPREHENSIVE PROTECTION UNDER THE COMMERCE CLAUSE THAN IS INTERSTATE COMMERCE.

The previous two parts, we think, have demonstrated that this tribal commerce – were it interstate commerce – would in these circumstances be shielded from the state taxes imposed. But if the Court should reject that argument, *Amici* submit that state power to tax Indian commerce is narrower than where interstate commerce is involved.

A. The purpose of the Indian commerce clause is protective.

In *Japan Line, Ltd, v. County of Los Angeles,* 47 U.S.L.W. 4477, 4480 (April 30, 1979), this Court recently rejected the notion that "Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved" and required "more extensive constitutional inquiry" where states seek to tax foreign commerce. The constitutional inquiry centers around the purpose of each component of the Commerce Clause. The chief purpose of the interstate commerce clause is to require equality in each state's treatment of its own commerce and that of its sister states. A free trade zone is established. Protectionist measures are prohibited. By contrast, the purposes of the Indian commerce clause are different. The very reason for the clause is to protect Indians and Indian commerce. In *United States v. Forty Three Gallons of Whiskey,* 93 U.S. 188, 194 (1876), this Court contrasted the power of Congress and the states over Indians under the Articles of Confederation and the Constitution. It observed that in the Articles: "* * * two limitations were placed upon the power of Congress over Indian affairs: the Indians must not be members of any

State, nor must Congress do anything to violate or infringe the legislative right of a State within its own limits." The Court concluded that:

> "of necessity, these limitations rendered the power of no practical value. This was seen by the Convention which framed the Constitution * * *: The only efficient way of dealing with the Indian Tribes was to place them *under the protection of the General Government.* Their peculiar habits and character required this; * * *."

Ibid (emphasis supplied).

Thus, state control over Indian commerce under the Articles was replaced by the Constitution which "provid[ed] that intercourse and trade with the Indians should be carried on solely under the authority of the United States," *ibid.* The State's taxation here would return to the rejected provisions of the Articles, ignoring the protective purpose recognized by this Court as the basis of the Indian Commerce clause.

B. The Indian commerce power is similar to the foreign commerce power.

In *United States v. Forty-Three Gallons of Whiskey,* 93 U.S. 188, 194 (1876), this Court observed that the "power to regulate commerce with the Indian Tribes . . . [is] as broad as that to regulate commerce with foreign nations."[17] Like foreign commerce, Indian commerce involves political relationships which have from the beginning always been peculiarly the province of the federal government. As with state taxation of foreign commerce, the Indian commerce cases have adhered to the standard that there must be "no detraction whatever from . . . sov-

[17]The Indian commerce power has always been viewed as "much broader than the power over commerce between states." FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW, pp. 91 (G.P.O. 1942).

ereignty" as a result of the state tax or regulation. Compare *Bob-Lo Excursion Co. v. Michigan,* 333 U.S. 28, 36 (1948) with *Williams v. Lee,* 358 U.S. 217, 221 (1958):

> "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."

Amici submit that this Court's decisions in the field of state taxation and regulation of Indian commerce have generally recognized the above congruence between Indian and foreign commerce. State action has been permitted *only* when it is clear that there will be no inferference either with federal purposes and policy or with the sovereignty of Indian tribes. More specifically, the Court's decisions have allowed state taxation of non-Indians engaged in Indian commerce only where no burden or a "minimal burden" is imposed, *Confederated Salish & Kootenai Tribes v. Moe,* 425 U.S. 463, 483 (1976), or where the effect of the tax on the Indians is "remote and indirect." *Thomas v. Gay,* 169 U.S. 264, 273 (1898) (territorial tax). Otherwise, state taxation of Indian commerce with non-Indians[18] has been precluded. As the Court observed in *McClanahan v. Arizona State Tax Comm.,* 411 U.S. 164, 179 (1973),[19] "both the tribe

[18]No interference with Indian commerce, of course, is presented if a state taxes non-Indians engaged in commerce with other non-Indians on a reservation. Cf. *Draper v. United States,* 164 U.S. 240 (1896).

[19]*McClanahan,* on its facts, involved state taxation of Indians. But the State is simply wrong to suggest that the Court's test in *Williams v. Lee, supra* – that state action is invalid if it infringes "on the right of reservation Indians to make their own laws and be ruled by them" – is applicable only where the state seeks to tax "*reservation Indians.*" St. Br., p. 67. This Court said *precisely the*

[footnote continued]

and the state could fairly claim an interest in asserting their respective jurisdictions" over transactions involving both Indians and non-Indians. The Court held state taxation and regulatory authority permitted only "up to the point where tribal self-government would be affected."[20] *Ibid.*

This standard controls here. The only case where the Court has permitted state taxation of non-Indians engaging in Indian commerce where there might arguably have been more than a minimal impact on Indian commerce or tribal government is *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949).[21] There the Court permitted the State to impose a production tax on oil and gas extracted by a non-Indian mineral lessee of allotments held in trust by the United States "for various members of the Pottawatomie, Apache, Comanche and Otoe and Missouria Tribes." *Id.* at 344. In *Texas Co.*, the Court overruled

opposite in *McClanahan*, 411 U.S. at 179 (1973): "It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians." See also *Fisher v. District Court*, 424 U.S. 382, 386 (1976).

[20] In the criminal area, state jurisdiction is allowed *only* where neither the accused nor the victim of a crime is Indian. *United States v. Antelope*, 430 U.S. 641, 643-644 and notes 2 and 4 (1977); *Draper v. United States*, 164 U.S. 240 (1896); 18 U.S.C. 1152-1153. If an Indian is involved in the crime either as accused or victim, federal and tribal jurisdiction are exclusive.

[21] Another case cited by the State (St. Br. p. 61) as supporting state taxing authority over non-Indians on reservations – *Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885) – is inapposite because it did not involve commerce with Indians. In *Fisher*, the Territory of Idaho was permitted to impose a tax on the property of a railroad over lands once owned by Indians. The Indians had *ceded* the lands over which the railroad was constructed and Congress had by statute granted them to the company in fee. The lands were not part of the reservation area and the railroad was not engaged in any commerce with the Indians which could be infringed by the state tax.

prior case law which held non-Indian lessees of Indian lands to be automatically exempt from state property taxes on the ground that they were "federal instrumentalities." The Court did not consider the impact of the taxes on either Indian commerce or tribal self-government. In any event, it is unlikely that there was a significant adverse impact on either Indian commerce or government in that case. The leased lands were allotted, not tribal, lands on reservations which did "not possess the usual accoutrements of tribal self-government." *McClanahan*, 411 U.S. *supra* at 167-168; see *Oklahoma Tax Comm. v. United States*, 319 U.S. 598 (1943); *Tooisgah v. United States*, 186 F.2d 93, 97-98 (C.A. 10, 1950).

Far more than a "minimal burden" or a "remote and indirect" effect on Indians would follow from the state taxation at issue in this case. The "point where tribal self-government would be affected" has clearly been passed. As the district court found, imposition of state taxes here would destroy the Indian commerce involved,[22] and the tribes would lose control over reservation economic development.[23]

[22] The State is simply wrong to assert that "the nature and extent of the Tribe's tax base . . . has nothing to do with the relation between the Tribe and its members" and "the establishment of tribal enterprises designed primarily to cater to non-Indians has nothing to do with the relation between the Tribe and its members." St. Br., p. 70. The contrary is true: tribal commerce with the relatively more affluent non-Indian community is an essential avenue for economic betterment of the tribes' members.

[23] Conceding that Indian commerce would be "discourage[d], if not entirely eliminate[d]" by its taxes (St. Br., p. 69), the State callously argues that its eradication of Indian commerce is lawful so long as the Tribe is not rendered "unable to govern their members." *Ibid.* The critical questions are whether tribal government is "affected," not whether it is destroyed, whether a promising tribal economic development program will be thwarted, not whether tribal government can manage to function in some fashion despite the tax.

IV.

TRIBES HAVE THE POWER TO TAX NON-INDIANS PURCHASING GOODS FROM INDIANS ON RESERVATION TRUST LANDS.

A premise of our argument in the preceding sections is that tribes have power to impose a tax on sales by Indians to non-Indians on trust land within the reservation. "It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve"[24]: the tribes are not claiming power to tax transactions entirely between non-Indians,[25] or transactions occurring outside a reservation[26] or on lands within reservation boundaries owned in fee by non-Indians. The transactions sought to be taxed here arise on the tribe's own trust lands and clearly involve and affect Indians.

The governmental status of Indian tribes is well established and has been repeatedly confirmed by this Court. E.g., *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975). This Court has, of course, also made it clear that tribal governmental authority is not absolute or unlimited. Its extent was recently summarized by the Court in *Wheeler, supra*, at 323:

> "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' *United States v. Kagama, supra*, at 381. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers: by statute, in the exercise of its plenary control, Congress has removed still others.
>
> "But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than 'private, voluntary organizations.' *United States v. Mazurie*, 419 U.S. 544, 557; see also *Turner v. United States*, 248 U.S. 354, 354-355; *Cherokee Nation v. Georgia, supra*, at 16-17. The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. *In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.* See *Oliphant v. Suquamish Indian Tribe*, ante." (emphasis supplied)

Since no treaty or statute has retracted tribal power to tax transactions between Indians and non-Indians, the issue is whether this power has been "withdrawn by . . . implication as a necessary result of [the tribes'] dependent status." In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court concluded that tribal criminal jurisdiction over non-Indians *had* been implicitly withdrawn by Congress. *Oliphant*, however, does not impeach the long-established tribal taxing authority over non-Indians engaged in commerce with Indians where no

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[24] *McClanahan v. Arizona Tax Comm.*, 411 U.S. 164, 167 (1973).

[25] E.g., *Draper v. United States*, 164 U.S. 240 (1896).

[26] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

criminal penalties are imposed. Indeed, the Court's analysis in *Oliphant* supports tribal taxing power in the circumstances presented by this case.

In *Oliphant*, the Court relied heavily on the "commonly shared presumption of Congress, the Executive Branch and lower federal courts that tribal courts do not have the power to try non-Indians. . . ." *Id.* at 206. The Court discussed opinions of the Attorney General in 1834 and 1855[27] holding that tribes had no criminal jurisdiction over non-Indians, and a later opinion by the Solicitor of the Interior Department reaching the same conclusion. The few prior judicial decisions on the subject also held tribal criminal authority over non-Indians precluded. Most importantly, the Court pointed out that Congress had recurrently in its consideration of Indian legislation spanning two centuries acted on the assumption that Indian tribes did not possess power over non-Indian criminal defendants.

The history of congressional, executive and judicial treatment of tribal power to tax non-Indians who enter the reservation to do business with Indians[28] is precisely

[27]The 1855 Attorney General's opinion which denies tribal criminal jurisdiction over non-Indians holds that the tribe in question *retained* civil authority over non-Indians. 7 Ops. Atty. Gen'l 174 (1855).

[28]The Court in *Oliphant* cited two other instances where tribes lost governmental power by necessary implication from their dependent status – the power to dispose of their lands to for-

[footnote continued]

the opposite: this tribal power has long been sustained in virtually every situation where it has been considered.

A. Judicial treatment.

Every case to consider the specific question, except one recent unreported district court decision now on appeal,[29] has upheld tribal power to tax non-Indians. This Court's early decision in *Morris v. Hitchcock*, 194 U.S. 384 (1904),[30] sustained a tax imposed by a tribal ordinance upon non-members for the privilege of grazing cattle on reservation lands.[31] Contemporaneous with *Morris*, a court of appeals held that a tribe could lawfully require outsiders to pay a permit tax, or license fee, as a condition precedent to non-Indians doing business with Indians on the reservation. *Buster. v. Wright*,

eign sovereigns or to form political connections with foreign governments. *Id.* at 209. Clearly, neither is involved here.

[29]*Merrion v. Jicarilla Apache Tribe*, No. 78-1154, C.A. 10 (argued May 17, 1979). *Merrion* is, in part at least, distinguishable from our situation since in that case the district court considered that a statute, 25 U.S.C. 398, which specifically authorized states to tax oil and gas royalties received by tribes, had preempted any concurrent tribal authority.

[30]*Morris* was cited with approval by the Court in *Oliphant*, 435 U.S. *supra* at 206.

[31]An Attorney General's opinion twenty years before *Morris* had upheld the tribe's authority to issue and require the licenses involved there, stating:

> "In the absence of treaty or statutory provisions to the contrary, the Choctaw and Chickasaw Nations have power to regulate their own right of occupancy, and to say who shall participate therein and upon what conditions; and hence may require permits to reside in the nation from citizens of the United States, and levy a pecuniary exaction therefor."

18 Ops. Att'y Gen'l 34 (1884)

135 Fed, 947 (C.A. 8, 1905), appeal dismissed, 203 U.S. 599 (1906). The court stated:

> "The authority of the Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origins in any act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. . . . The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by Act of Congress or by the contracts of the Creek Tribe itself."[32]

This Court dismissed the appeal in *Buster* on the merits, and costs were taxed to the appellants.

The issue of tax jurisdiction next appears in two courts of appeals decisions in the 1950's concerning a tribal tax on non-Indian lessees grazing livestock on individual trust allotments. In *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 99 (C.A. 8, 1956) the court of appeals, citing *Buster v. Wright*, held that the tribe had given "orderly implementation" to its power to tax non-members:

> ". . . through the adoption of a constitution which, among other things, has specifically provided for the levy of taxes. Such action was taken in accordance with the provisions of the Indian Reorganization Act, 1934, ...
>
> We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, supra, that such power still exists."

[32] Accord: *Maxey v. Wright*, 54 S.W. 807 (Ct. Ap. Indian Terr 1900), aff'd 105 Fed. 1003 (C.A. 8, 1900).

The same result was reached in *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (C.A. 8, 1958), *cert. denied*, 358 U.S. 932 (1959).

The State and various electrical power companies as *amicus curiae* seek to distinguish these cases as sustaining only a proprietary, treaty right of the tribes in question to exclude non-Indians from tribal lands rather than affirming tribal governmental power over non-Indians.[33] Of course, even if this distinction were valid, the tribes all own the lands where the sales take place in this case. But the proposed distinction is clearly refuted by the facts of the prior cases. For example, *Buster v. Wright* involved a tax imposed on owners of *fee lands*, not tribal lands. Similarly, *Iron Crow* concerned the power of a tribe, confirmed by a federal statute, to tax non-Indian

[33] State Br., pp. 76-79; Brief of Salt River Project and others (hereafter "SRP Brief") as *amicus curiae*, pp. 15-22.

lessees of lands *allotted to individual Indians.*[34] In neither case did the tribe have any "proprietary" rights in the lands where the taxed activities of the non-Indians occurred.[35]

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[34]The Salt River Project brief acknowledges the inapplicability of its analysis to *Iron Crow* and *Barta*, but lamely argues that the court in those cases "missed the governmental/proprietary distinction." SRP Br., p. 20.

[35]The Salt River Project brief persistently misstates the teaching of Felix Cohen's monumental Indian law treatise. The treatise does not "acknowledge that *Morris v. Hitchcock* and its descendants were based upon the proprietary power to exclude nonmembers, and not tribal self-government. F. Cohen, *Federal Indian Law*, 266-67." (SRP Br., p. 22).

At the portion of the treatise cited, Cohen states that:

> "Though the scope of the power (of tribes) as applied to nonmembers is not clear, it extends at least to property of nonmembers used in connection with Indian property as well as to privileges enjoyed by nonmembers in trading with the Indians.[123] The power to tax nonmembers is derived in the cases from the authority, founded on original sovereignty and guaranteed in some instances by treaties, to remove property of nonmembers from the territorial limits of the tribe. Since the tribal government has the power to exclude, it can extract a fee from nonmembers as a condition precedent to granting permission to remain or to operate within the tribal domain.[124] (emphasis supplied)

The footnotes cite *Morris*, *Buster v. Wright* and later cases.

Mr. Cohen was "an acknowledged expert in Indian law," *Squire v. Capoeman*, 351 U.S. 1, 8-9 (1956). He clearly believed tribes had power to tax non-Indians within "the territorial limits of the tribe" who engaged in "trading with the Indians." See also Cohen, *Indian Rights and the Federal Courts*, 24 Minn.L.Rev. 145 (1940). His analysis, plain on its face, is misstated by the Salt River Project's brief.

B. Congressional and executive treatment.

The Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq*, supports tribal authority to tax non-Indians engaging in reservation commerce with Indians. Section 16 of that Act, 25 U.S.C. 476, authorizes Indian tribes to organize and adopt a constitution, and provides that:

> "*In addition to all powers vested in any Indian tribe or tribal council by existing law*, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: * * *" (emphasis added).

Although the 1934 Reorganization Act does not expressly confer taxing power on tribes,[36] the Interior Solicitor in an opinion contemporaneous with the act held that tribes organizing under the Act could adopt constitutions authorizing taxation of members and non-members because this was a power tribes already held under existing law.[37] *Powers of Indian Tribes*, 55 I.D. 14,

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[36]When the Indian Reorganization Act was before the Senate, the Commissioner of Indian Affairs submitted a detailed legal memorandum concerning the power of Congress to authorize tribes "to levy assessments and taxes," in which *Buster v. Wright* was cited and discussed. *Hearings Before the Committee on Indian Affairs, United States Senate, on S.2755 and S.3645*, "To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise" 73rd Cong., 2d Sess., Part 2, pp. 268-270 (1934).

[37]For this reason, the court below correctly reasoned that, whether or not a tribe is organized under the 1934 Act, it retains taxing authority over non-Indians in these circumstances (446 F. Supp. at 1361).

46-50 (1934). The Solicitor's opinion reasoned that tribes have these powers inherently, citing *Morris v. Hitchcock, supra,* and *Buster v. Wright, supra.* This has continued to be the view of the Interior Department. E.g., Opinion of Solicitor, October 13, 1976, *Tribal Jurisdiction over Non-Indians in Civil Matters: Approval of Various Ordinances of the Crow and Shoshone-Bannock Tribes.*[38] It has also been the longstanding view of the Attorney General.[39] Finally, the Interior Department has consistently approved tribal constitutions which contain the power to tax the privilege of doing business within the reservation.

Congress thus at least implicitly confirmed tribal taxing power by the Indian Reorganization Act, and the executive has so implemented the Act. Congress has certainly not recurrently legislated with an assumption that tribes lack the power to tax non-Indians. In contrast to the criminal area,[40] Congress has not moved to extend federal taxing authority, impose civil regulations or afford federal court jurisdiction over commercial transactions between Indians and non-Indians in Indian country.

The tribes in this case do not seek to tax non-Indian activities on reservations which do not involve Indian

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[38]We have lodged a copy of this unpublished opinion with the Clerk of the Court.

[39]See notes 27 and 31, *supra.*

[40]Congress has often differentiated between criminal and civil jurisdiction in legislation affecting Indian tribes. For example, in the Indian Civil Rights Act, 25 U.S.C. 1301 *et seq,* Congress provided for federal court habeas corpus review of tribal court convictions while leaving civil suits entirely to tribal courts. E.g., *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). See also 7 Ops. Att'y Gen'l 174 (1855), discussed *supra,* n.27.

commerce or affect Indians. Their power to tax non-Indians engaged in commercial transactions with Indians on reservations is well established by previous case law and executive and congressional action and should not be disturbed. This Court should reaffirm tribal taxing jurisdiction where non-Indian activities affect Indians, and lay to rest any question that *Oliphant* upset prior precedent and settled expectations in this area. As the Court stated in *McClanahan,* 411 U.S. *supra* at 179, tribes can "fairly claim an interest in asserting * * * jurisdiction" over transactions involving both Indians and non-Indians.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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July 6, 1979